

CASE NO.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED
HEALTHCARE WORKERS-WEST,**

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

NATIONAL LABOR RELATIONS BOARD

CASE NO.: 32-CA-063475; 362 NLRB NO. 139

PETITION FOR REVIEW

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Petitioner, **SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST** hereby files this Petition for Review from the Decision and Order of the National Labor Relations Board entitled American Baptist Home of the West d/b/a Piedmont Gardens *and* Service Employees International Union, United Healthcare Workers-West, 362 NLRB No. 139, Case No.: 32-CA-063475 issued on June 26, 2015. A copy of the Decision and Order of the National Labor Relations Board is attached as Exhibit A.

Date: July 2, 2015

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ DAVID A. ROSENFELD

By: DAVID A. ROSENFELD
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing PETITION FOR REVIEW with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 2, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Ms. Linda J. Dreeben National Labor Relations Board 1099 14th Street, N.W. Washington, DC 20570 linda.dreeben@nrlrb.gov <i>For the General Counsel,</i>	Mr. Gary W. Shinnors Executive Secretary National Labor Relations Board 1099 14th Street, NW Washington, DC 20570 Gary.Shinnors@nrlrb.gov
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I certify that the above is true and correct. Executed at Alameda, California,
on July 2, 2015.

/s/ Katrina Shaw

Katrina Shaw

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American Baptist Homes of the West d/b/a Piedmont Gardens and Service Employees International Union, United Healthcare Workers-West. Case 32-CA-063475

June 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

The issues in this case are whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to provide the Union with the names, job titles, and written statements of three individuals who claimed that they witnessed an employee engaging in workplace misconduct that resulted in the employee's termination. The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the requested names and job titles. He dismissed the allegation regarding the witness statements, however, finding them exempt from disclosure under *Anheuser-Busch, Inc.*, 237 NLRB 982, 984-985 (1978), in which the Board held that the general duty to furnish information "does not encompass the duty to furnish witness statements themselves."¹

We agree with the judge's findings regarding the names and job titles, but we disagree as to the witness statements. For the reasons set forth below, we have decided to overrule *Anheuser-Busch's* blanket exemption for witness statements. Instead, in future cases when an

employer argues that it has a confidentiality interest in protecting witness statements from disclosure, we shall apply the balancing test set forth in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), as we do in all other cases involving assertions that requested information is confidential. Under *Detroit Edison*, the Board balances the union's need for requested information against any "legitimate and substantial confidentiality interests established by the employer." *Id.* at 318-320. In the present case, however, we will apply *Anheuser-Busch* because, as explained in this decision, we find that retroactive application of the *Detroit Edison* test would work a "manifest injustice" on the Respondent, which expressly relied on the *Anheuser-Busch* rule. Consistent with that rule, we adopt the judge's finding, as set forth in detail below, that two of the witnesses' statements were exempt from disclosure. Contrary to the judge, however, we find that Charge Nurse Hutton's statements were not witness statements within the meaning of *Anheuser-Busch*.²

Accordingly, we adopt the judge's rulings, findings,³ and conclusions in part, reverse them in part, and adopt the recommended Order as modified and set forth in full below.

Facts

The Respondent operates a continuing care facility in Oakland, California, that provides three levels of care for its residents: independent living, assisted living, and skilled nursing. The Union represents a unit that includes the facility's certified nursing assistants (CNAs); the unit does not include the charge nurses, whose duties include reporting employee misconduct to management. In June 2011,⁴ Charge Nurse Barbara Berg notified the

¹ On April 16, 2012, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The General Counsel and the Charging Party filed exceptions and the General Counsel filed a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. Additionally, the Respondent filed limited cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

On December 15, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 46 (2012). Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order.

² Chairman Pearce, Member Hirozawa, and Member McFerran join in overruling *Anheuser-Busch*. Members Miscimarra and Johnson dissent from this part of the Board's decision, but they join the majority in finding that the new rule must be applied prospectively. Chairman Pearce and Members Hirozawa, Johnson, and McFerran agree that Hutton's statements were not witness statements within the meaning of *Anheuser-Busch*.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We have modified the judge's recommended Order to conform to our findings and to the Board's standard remedial language. Contrary to the judge, we find that the violations here do not warrant a public reading of the notice, and we have modified the Order to reflect that determination, as well.

We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

⁴ All dates are in 2011 unless otherwise indicated.

Respondent's human resources director, Alison Tobin, that she had seen CNA Arturo Bariuad sleeping on duty. Tobin asked Berg to prepare a written statement so that the Respondent could begin an investigation; Tobin informed Berg that her statement would be kept confidential. Berg prepared a statement, as requested.

Charge Nurse Lynda Hutton also allegedly observed Bariuad sleeping on duty. After learning that Berg had reported Bariuad's actions to management, Hutton prepared a statement reporting Bariuad's conduct, signed it, and slipped it under Tobin's door. No one had asked Hutton for the statement, nor was she given any assurance of confidentiality. Nevertheless, Hutton testified that she assumed that it would be kept confidential. One or 2 days later, Hutton submitted a second statement after Tobin asked her to clarify the date of the alleged incident.

Tobin also asked CNA Ruth Burns, the only other unit employee working the night shift with Bariuad, to prepare a statement documenting instances when she allegedly witnessed Bariuad sleeping while on duty. Consistent with the Respondent's general policy, Tobin assured Burns that her statement would be kept confidential. Burns complied with Tobin's request and prepared a statement.

After reviewing the witness statements, the Respondent terminated Bariuad's employment. Following Bariuad's termination, Union Representative Donna Mapp sent the Respondent's acting human resources director, Lynn Morgenroth, an information request seeking, in relevant part, "[a]ny and all statements that [were used] as part of your investigation into Mr. Arturo [Bariuad]" as well as "[t]he names and job title of everyone [who] was involved in the investigation." On June 17, the Union filed a grievance over Bariuad's termination and, that same day, Morgenroth responded to the Union's information request via email. Morgenroth provided the names of the managers who conducted the investigation, but did not provide any of the remaining information. With respect to the Union's request for witness statements, Morgenroth stated:

The employer conducted a confidential investigation regarding the allegations, as such disclosures of this information would breach witness confidentiality. The Grievant (whom you represent) was present when the incident(s) occurred, so you already have this information. The law does not require that we provide you with witness statements collected during our investigation. See *Anheuser-Busch*, 237 NLRB 982 (1978); *Fleming Companies, Inc.*, 332 NLRB 1086 (2000); *Northern Indiana Public Service Company*, 347 NLRB No. 17 (2006). However, the Company would like to

work with the Union regarding an accommodation to disclosure. Mr. Bariuad's statement is included in his HR file, attached.

At no time did the Respondent furnish the requested names, job titles, or witness statements.

Judge's Decision and Exceptions

Applying *Pennsylvania Power Co.*, 301 NLRB 1104 (1991), the judge found that the Respondent did not establish a legitimate and substantial confidentiality interest in the witnesses' names and job titles, and therefore it violated Section 8(a)(5) and (1) of the Act by failing to provide them. Applying *Anheuser-Busch*, supra, he found that the Respondent was not required to provide the witness statements. Accordingly, he dismissed the complaint allegation regarding those statements.

Excepting to the judge's finding that the witness statements were exempt from disclosure, the General Counsel and the Charging Party urge the Board to overrule *Anheuser-Busch*. They argue that its bright-line rule is inappropriate and that, instead, the Board should apply the balancing test articulated by the Supreme Court in *Detroit Edison Co.*, 440 U.S. 301. In the alternative, the General Counsel contends that, even under *Anheuser-Busch*, Charge Nurse Lynda Hutton's statements were not exempt from disclosure, because the Respondent did not provide her with an assurance of confidentiality before she provided the statements.

The Respondent cross-excepts to the judge's finding that it violated the Act by failing to provide the names and job titles of the witnesses. The Respondent argues that, under *Detroit Edison*, it had a confidentiality interest that outweighed the Union's need for that information. The Respondent also argues that the Board should expand the scope of *Anheuser-Busch* to exempt the names of witnesses.

Discussion

After careful consideration, we find that the rationale of *Anheuser-Busch* is flawed. In our view, national labor policy will best be served by overruling that decision and, instead, evaluating the confidentiality of witness statements under the balancing test set forth in *Detroit Edison*.

Section 8(a)(5) of the Act imposes on an employer the "general obligation" to furnish a union with relevant information necessary to the union's proper performance of its duties as the collective-bargaining representative of its employees, including information that the union needs to determine whether to take a grievance to arbitration. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). In *Acme*, the Supreme Court observed that providing a union with information relevant to the processing of griev-

ances not only aids the union in representing grievants, but allows it to “sift out unmeritorious claims.” *Id.* at 438. To that end, the Board applies a liberal test to determine whether information is relevant; the issue is whether the requested information is of “probable” or “potential” relevance. *Transport of New Jersey*, 233 NLRB 694, 694 (1977). As the Board explained in *Pennsylvania Power*: “[T]he information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided.” 301 NLRB at 1105.⁵

Establishing relevance, however, does not necessarily end the inquiry. If a party asserts that requested information is confidential, the Board balances the union’s need for the relevant information against any “legitimate and substantial confidentiality interests established by the employer.” See *Detroit Edison*, *supra* at 318–320. See also *Pennsylvania Power Co.*, *supra* at 1105; *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984).⁶ “The confidentiality interest of the employer . . . is not fixed; it may vary with the nature of the industry or the circumstances of a particular case.” *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999), quoting *Resorts International v. NLRB*, 966 F.2d 1553, 1556 (3d Cir. 1993). Establishing a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of employment investigations. An employer must instead “determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, [or] there is a need to prevent a cover up.” *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 14–15 (2011). If such showing is made, the Board then weighs the party’s interest in confidentiality against the requester’s need for the information. *Pennsylvania*

Power, *supra* at 1105. Even if the Board concludes that the confidentiality interest outweighs the requester’s need, the party asserting confidentiality may not simply refuse to provide the information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party’s interest in confidentiality. *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). Since the Supreme Court’s decision in *Detroit Edison*, the Board has applied this test in all cases where a party has raised a confidentiality defense to a request for information, except where the requested information is witness statements.⁷

Notwithstanding the employer’s general duty to provide relevant information, the Board in *Anheuser-Busch* created a broad, bright line exception, holding that “the ‘general obligation’ to honor requests for information, as set forth in *Acme* and related cases, does not encompass the duty to furnish witness statements . . .” 237 NLRB at 984–985. In creating that rule, the Board concluded that witness statements “are fundamentally different from the types of information contemplated in *Acme*, and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information.” *Id.* at 984. The Board cited *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), in which the Supreme Court held that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, did not require the Board to disclose, prior to an unfair labor practice hearing, statements of witnesses whom the Board intended to call at the hearing. Although acknowledging that *Robbins Tire*

⁵ The duty to provide relevant information is not an obligation imposed on employers alone; a similar duty is owed by unions. *Detroit Newspaper Printing & Graphic Communications Local 13* (Oakland Press), 233 NLRB 994 (1977), *enfd.* 598 F.2d 267 (D.C. Cir. 1979).

⁶ In addition to confidentiality, the employer can assert a number of other defenses to a union’s request for information, including the work-product doctrine. For that reason, Member Johnson’s argument that application of the *Detroit Edison* test to employer confidentiality claims will “interfere with an employer’s work product” is unfounded. The work product doctrine is a separate defense that an employer may raise in response to a union’s request for information, including witness statements, and the Board will continue to evaluate that defense on its own merits. See *Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004). We see no basis for Member Johnson’s apparent claim that the prospect of having to invoke the work product doctrine—a fixture of American law—will unduly interfere with the employer’s conduct of investigations.

⁷ Member Miscimarra contends that by adopting a balancing test for witness statements, the Board improperly requires the employer to balance the competing interests, thereby disregarding the Board’s “responsibility to apply the Act to the complexities of industrial life.” (Citation omitted.) We reject that contention, which, if meritorious, would bar the Board from doing what every reviewing court has authorized the Board to do: apply the *Detroit Edison* balancing test to all other claims of confidentiality in information cases. A union’s request for witness statements is the only significant exception to that rule, and the exception was self-imposed. Today’s decision merely brings requests for witness statements under the same rubric as other requests for allegedly confidential information. Under that rubric, although the employer must assert a claim of confidentiality (or waive it) in response to the union’s request for information, the employer is then obligated only to offer an accommodation. If the union is dissatisfied with the offer, it is then required to respond and explain why the proffered accommodation is insufficient. See e.g. *Metropolitan Edison Co.*, 330 NLRB at 109. If this bargaining process fails, and an unfair labor practice charge is filed, the Board will then adjudicate the interests of the parties. This procedure removes the Board from the process, but it remains available to prevent parties from circumventing their obligation to share nonconfidential information and to bargain over disputes. Further, placing the initial burden of invoking a confidentiality interest on the employer permits it—in the first instance—to identify and justify its own interests, rather than have the Board make categorical determinations about specific types of confidential matters.

addressed only the “special danger flowing from prehearing discovery in NLRB proceedings,” 437 U.S. at 239, the Board relied on the Court’s observations that the premature release of witness statements risked employer and union intimidation of potential witnesses, as well as the possibility that witnesses might be reluctant to give statements at all absent assurances against prehearing disclosure. *Anheuser-Busch*, supra at 984.

Today, we reject the premise of *Anheuser-Busch* that witness statements are unique and fundamentally different from the types of information contemplated in *Acme*.⁸ If requested information is relevant and necessary to the union’s representative duties, then the provision of the requested information serves the purposes of the Act. And information is particularly helpful in the grievance context, where the union must decide whether to expend limited resources processing a grievance at all. The goal of collectively bargained dispute resolution procedures is to resolve grievances quickly and economically, and the sharing of information furthers that goal.⁹

That is not to say that there are no other factors to consider or that a union is always entitled to receive the information that it seeks. But we are not persuaded that witness statements are so fundamentally different from other types of information that a blanket exemption from disclosure is warranted. In this respect, we find it significant that *Anheuser-Busch* predated *Detroit Edison* and, therefore, was formulated before the Supreme Court articulated the standard broadly applicable in all other confidential information cases.

Nor are we persuaded that *Robbins Tire* requires or justifies a blanket rule exempting witness statements from an employer’s duty to provide relevant information. As described, *Robbins Tire* did not involve a union’s right under the Act to information relevant to its role in the collective-bargaining process. Rather, *Robbins Tire* held only that the FOIA did not require prehearing disclosure of Board affidavits, finding that the affidavits were covered under the FOIA exemption for records compiled for law enforcement proceedings. In making that finding, moreover, the Court relied not only on the potential for coercion or intimidation of witnesses, as

noted by the Board in *Anheuser-Busch*, but also on the absence of any evidence of Congressional intent to overturn the Board’s longstanding rule against prehearing disclosure of witness statements in the interest of protecting the Board’s enforcement mechanisms. *Robbins Tire*, supra at 242–243.¹⁰ Where relevant information is requested in the context of a bargaining relationship, however, the Board’s underlying policies favor disclosure. See *Acme*, supra at 437.¹¹ Thus, the policy concerns pull in opposite directions, further undercutting the rationale of *Anheuser-Busch*.

We recognize that, in some cases, there are legitimate and substantial confidentiality interests that must be accommodated, including the risk that employers or unions will intimidate or harass those who have given statements, or that witnesses will be reluctant to give statements for fear of disclosure.¹² But similar risks are presented by the disclosure of witness names, for which there is no blanket exemption. In fact, the Board in *Anheuser-Busch* specifically affirmed the holding of *Transport of New Jersey*,¹³ in which the Board held that an employer, who claimed that the disclosure of witness names would expose the witnesses to harassment, had a duty to produce the requested information. 237 NLRB at 984 fn. 5. The Board found that the employer’s concerns

¹⁰ That longstanding rule continues. See *Santa Barbara News-Press*, 358 NLRB No. 155, slip op. at 2 (2012) (citing cases), incorporated by reference, 361 NLRB No. 88 (2014).

¹¹ Congressional intent regarding the application of the FOIA clearly is irrelevant in this context.

¹² We reject Member Miscimarra’s belief that this risk is so high “[w]hen employees step forward to provide information that may involve a coworker’s misconduct” that it is “reason enough to adhere to the rule of *Anheuser-Busch*.” We have acknowledged the possibility of retaliation against employees whose information leads to the investigation and possible discipline of another employee. Our decision allows parties concerned over a request for witness statements to weigh the risks of retaliation against the union’s need for the information, just as parties have been doing for decades when dealing with requests for witness names. We see no reason to think that the furnishing of witness statements, in addition to witness names, will increase the risk of retaliatory actions.

Furthermore, nothing in our decision today prevents the parties from bargaining over a reasonable accommodation, such as a nondisclosure agreement, when the employer has a legitimate confidentiality concern regarding the union’s use of the requested information. Finally, we observe that Member Miscimarra’s discussion of the possibility of retaliation by supervisors or coworkers is beside the point. If disclosure is ultimately required under the Supreme Court’s *Detroit Edison* standard, it is disclosure to the union, not to supervisors or coworkers. And as the case he cites illustrates, the union can, and almost certainly will, refuse to provide such statements to involved individuals. See *Mail Handlers Local 307 (Postal Service)*, 339 NLRB 93, 95 (2003).

¹³ 233 NLRB 694 (1977).

⁸ *Acme* itself concerned information about subcontracting. See 385 U.S. 432. The Court upheld the Board’s finding that the employer was required to provide information about the removal of certain equipment from the plant where the information was relevant to grievances the union had filed. *Id.*

⁹ We reject the position of our dissenting colleagues and the *Anheuser-Busch* Board that the disclosure of witness statements “would not advance the grievance and arbitration process.” Supra at 984. As the Supreme Court observed in *Acme*, arbitration is advanced by pre-arbitral exchanges of information. *Anheuser-Busch* frustrates that goal by maintaining a blanket exemption for witness statements.

were speculative and were outweighed by the union's need for the information. *Id.* at 695.¹⁴

A review of other Board decisions involving the disclosure of witness names establishes that the flexible approach of *Detroit Edison* adequately protects the interests of the employer and witnesses, while preserving the general right of requesting unions to obtain relevant information. In *Pennsylvania Power*,¹⁵ the Board found that the employer, which operated a nuclear power generating plant, established a legitimate and substantial confidentiality interest justifying its refusal to produce the names of informants who provided information about suspected employee drug use. In *Mobil Oil Corp.*,¹⁶ where the employer similarly refused to disclose the identity of the person who provided information that led to the mandatory drug screening of three employees, the Board again upheld the employer's confidentiality claim.¹⁷ In *Metropolitan Edison Co.*,¹⁸ the Board distinguished *Pennsylvania Power* and *Mobil Oil* and found that the employer violated the Act by refusing to disclose names of two informants who had provided information that led to the discharge of an employee for stealing food from the plant cafeteria. The Board assumed that the employer's confidentiality claim was legitimate and substantial, but found that the employer's blanket refusal to provide information was not justified; the Board then found that the employer had an obligation to offer an accommodation with regard to the disclosure of the information. *Id.* at 107. In the Board's view, "concerns about petty cafeteria theft, which poses no apparent threat to employee or public safety, do not carry the same unusually great weight as the interests that were found to be present in *Pennsylvania Power* and *Mobil Oil*." *Id.* at 108 (internal quotation marks omitted).

Like the disclosure of witness names, the disclosure of witness statements may raise legitimate and substantial concerns of confidentiality or retaliation in some cases. Nothing in our decision today precludes the assertion of those concerns in response to an information request or the Board's (or a reviewing court's) subsequent consid-

eration of them.¹⁹ But there is no basis for concluding that *all* witness statements, no matter the circumstances, warrant exemption from disclosure.²⁰ Rather, we will apply the same approach that we apply in cases involving witness names: if the requested information is relevant, the party asserting the confidentiality defense has the burden of proving that it has a legitimate and substantial confidentiality interest in the information, and that it

¹⁹ Our colleagues argue that applying a *Detroit Edison* balancing test to requests for witness statements will have adverse consequences, including increased Board litigation and an inability of employers to protect employee witnesses from harassment or intimidation. As the Board stated in response to similar concerns raised by former Member Hayes's dissent, the *Detroit Edison* balancing test takes into account any legitimate and substantial confidentiality interest that an employer may have, which would include concerns about witness intimidation. The *Detroit Edison* test encourages parties to a collective-bargaining agreement to work together to accommodate their competing interests. Thus, the test encourages collective bargaining—not, as our colleagues assert, needless litigation.

We also reject the dissents' arguments that our decision will make it more difficult for employers to conduct effective investigations. Of course, today's issue arises where collective-bargaining agreements have created grievance-arbitration procedures and protections for employees against unjust discipline or discharge. Our dissenting colleagues' narrow focus on the employer's interests in conducting investigations obscures this larger context and gives little, if any weight, to the statutory interest of employees in exercising and preserving their contractual rights. In any case, given typical management prerogatives and control over employees' terms and conditions of employment, employers continue to have more than adequate tools to conduct effective workplace investigations, notwithstanding the need to comply with federal labor law. For example, nothing in our decision today diminishes the employer's ability to *require* an employee to participate in a workplace investigation, as the Respondent did in this case. Nor does it prevent employers from requiring employees to report wrongdoing in the workplace, on penalty of discipline. Meanwhile, our colleagues point to no other federal statutory requirement that runs contrary to our holding today. Nothing in the EEOC order cited by Member Johnson conflicts with the approach we adopt. Indeed, that order—which addresses Investigations conducted by the Commission of its own employees, not investigations by employers regulated by the Commission—encourages investigators to keep the identity of participants confidential "to the greatest extent possible . . . except as necessary to conduct an appropriate investigation into the alleged violations or when otherwise required by law." This express qualification reflects the EEOC's acknowledgement that confidentiality interests have to be balanced with the requirements of other laws, such as, in the private sector, the National Labor Relations Act. In any event, much of the language Member Johnson quotes concerns witness names, and our precedent regarding disclosure of names remains unchanged. That an employer may have legal incentives to conduct a workplace investigation—or even a legal obligation to do so—does not mean that any labor law requirement applicable to the investigation unjustifiably impedes the employer's ability to comply with another statute.

²⁰ We reject Member Johnson's suggestion that the Board should provide a "safe harbor" for employers if "serious misconduct" is involved. We find the term "serious misconduct" too vague to offer meaningful guidance. And even if we could surmount that hurdle, we discern neither a rationale nor the need to exempt the employer in that situation from the obligation to make a particularized showing of the need for confidentiality.

¹⁴ Thus, contrary to the arguments of Member Johnson, the employer could not, even under the regime of *Anheuser-Busch*, assure employees in all investigations that their identity or participation in a workplace investigation would remain confidential.

¹⁵ 301 NLRB at 1106-1107.

¹⁶ 303 NLRB 780, 780-781 (1991).

¹⁷ The Board also found that the employer had no right simply to ignore the Union's information request, and it required the employer to provide a summary of the informant's report as an accommodation to the union.

¹⁸ 330 NLRB 107 (1999).

outweighs the requesting party's need for the information. See *Detroit Edison*, 440 U.S. at 318–320; *Jacksonville Area Association for Retarded Citizens*, 316 NLRB 338, 340 (1995). Whether the information withheld is sensitive or confidential will be assessed based on the specific facts in each case. See *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006).²¹

We find that this approach will effectively protect both the employer and the witnesses where the employer raises a reasonable concern regarding confidentiality, harassment, or coercion, while also safeguarding the union's statutory right to obtain information relevant to grievance processing. See *Fleming Cos.*, 332 NLRB 1086, 1088–1091 (2000) (Members Fox and Liebman, concurring).

Prospective Application

The next issue that we confront is whether the foregoing principles should be applied retroactively, i.e., in this case. The propriety of retroactive application in any particular case is determined by balancing any ill effects of retroactivity against “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Pursuant to this principle, the Board will apply a new rule to all pending cases, including the case in which the new rule is announced, so long as this does not work a “manifest injustice.” *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993). In determining whether retroactive application will cause manifest injustice, the Board balances three factors: (1) “the reliance of the parties on preexisting law”; (2) “the effect of retroactivity on accomplishment of the purposes of the Act”; and (3) “any particular injustice arising from retroactive application.” *SNE Enterprises*, 344 NLRB 673, 673 (2005) (citing cases). In this case, we find that it is appropriate to apply our new rule prospectively only.

The Board's decision today marks a departure from longstanding precedent, and the Respondent expressly relied on preexisting law under which its refusal to provide the witness statements was unquestionably lawful: in its letter to the Union concerning the witness statements, the Respondent cited *Anheuser-Busch*. Accordingly, in the present case and all other cases where the employer's refusal to provide requested witness statements occurred before the date of this decision, the

Board shall apply *Anheuser-Busch* in evaluating the lawfulness of the employer's conduct.

Ruling on the Merits²²

As stated above, the judge found that the statements of Berg, Hutton, and Burns were “witness statements” within the meaning of *Anheuser-Busch*. The judge also found, applying *Pennsylvania Power*, supra, that the names of the witnesses were not confidential, and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide them to the Union.

We adopt the judge's findings with respect to the witnesses' names and job titles. The Respondent argues that it has demonstrated a legitimate and substantial confidentiality interest because it has a policy of keeping the names of witnesses confidential, and because revealing the names of witnesses could lead to the harassment of those witnesses. The Respondent also argues that its confidentiality interest outweighs the Union's need for the information because the Union could have easily obtained the names of the employees working the night shift with Bariuad from the posted work schedules. We reject those arguments.²³ First, the judge properly found that an employer's policy of keeping names confidential does not by itself establish a legitimate and substantial confidentiality interest.²⁴ Second, the credited evidence fails to establish any factual basis for the Respondent's asserted concern regarding workplace harassment. Third, as the judge also found, the Union's ability to obtain the requested information elsewhere does not excuse the Respondent's obligation to provide the information. See *King Soopers, Inc.*, 344 NLRB 842, 845 (2005), enf'd. 476 F.3d 843 (10th Cir. 2007). Moreover, the Respondent's argument that the names of the witnesses were easily available from the posted schedule significantly undercuts its argument that the names and job titles were confidential. For the foregoing reasons, we adopt the judge's finding that the Respondent violated

²¹ We reject Member Miscimarra's suggestion that the Board's confidentiality standard will never be satisfied. The Board has applied *Detroit Edison* in a variety of information cases and has on many occasions vindicated the employer's assertion of confidentiality. See, e.g., *Pennsylvania Power*, supra; *Mobil Oil*, supra; and *Northern Indiana Public Services Co.*, supra.

²² Member Miscimarra joins this part of the Board's decision solely with respect to the Board's finding that the Respondent did not violate the Act by failing to provide the Union with the witness statements of Charge Nurse Barbara Berg and employee Ruth Burns.

²³ We also reject the Respondent's alternative request that the Board expand *Anheuser-Busch* to apply to witness names as well as witness statements. In addition, we reject Member Miscimarra's alternative argument that the Board should expand *Anheuser-Busch* to apply to any request for information that seeks the identity of witnesses who participated in the investigation. In our view, the protections afforded by *Detroit Edison* rule are sufficient to protect witnesses or the names of “everyone involved in the investigation,” as the Union requested here.

²⁴ In adopting the judge's finding, we do not rely on his citation to *Alcan Rolled Products*, 358 NLRB No. 11 (2012), a case decided when the Board lacked a quorum.

Section 8(a)(5) and (1) of the Act by refusing to provide the requested names and job titles of the witnesses.

Turning to the statements, in the absence of exceptions, we adopt the judge's finding that the statements of Berg and Burns were "witness statements" within the meaning of *Anheuser-Busch*. We therefore affirm the judge's finding that the Respondent did not violate the Act by failing to provide the Union with their statements.

We find merit, however, in the Acting General Counsel's argument that Charge Nurse Hutton's statements were not "witness statements." Contrary to the judge, we find it significant that Hutton's statements were not provided under an assurance of confidentiality. For a statement to be exempt under *Anheuser-Busch*, the statement must be adopted by the witness, and assurances must have been given to the witness that the statement will remain confidential. *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3, 458 (2010), enfd. 681 F.3d 651 (5th Cir. 2012). See also *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), enfd. 936 F.2d 144 (3d Cir. 1991). Here, although Hutton assumed that her statements would be confidential because of the Respondent's general policy regarding such statements, she was not prompted to give the statements by any assurance of confidentiality. In fact, at no time was Hutton given any affirmative assurance that her statements would be kept confidential. Rather, the record establishes that Hutton gave the statements because it was one of her job duties to do so. Accordingly, we find that Hutton's statements were not subject to the *Anheuser-Busch* exemption and that the Respondent therefore violated Section 8(a)(5) and (1) by failing to provide her statements to the Union.

ORDER

The National Labor Relations Board orders that the Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union by refusing to provide requested information that is relevant and necessary to the processing of a grievance.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the requested names and job titles of informants against Mr. Anuro Bariuad.

(b) Provide the Union with the statements of Lynda Hutton.

(c) Within 14 days after service by the Region, post at its facility in Oakland, California copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent Employer's authorized representative, shall be posted by the Employer and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. If the Employer has gone out of business or closed the facility involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since June 17, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 26, 2015

Mark Gaston Pearce,	Chairman
Kent Y. Hirozawa,	Member
Lauren McFerran,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

²⁵ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER MISCIMARRA, dissenting in part.

In this case, my colleagues complete a trilogy of recent decisions—also including *Fresh & Easy Neighborhood Market*¹ and *Banner Estrella Medical Center*²—where the Board is substantially undermining workforce investigations, to the detriment of employers and employees alike. Here, the Board majority finds that Section 8(a)(5) of the Act requires employers to disclose employee witness statements, except in narrow, unusual circumstances. For the reasons expressed in Member Johnson's well-reasoned separate opinion, I dissent from the majority's overruling of *Anheuser-Busch*, 237 NLRB 982 (1978)—a unanimous five-member decision—which exempted witness statements from the employer's duty to provide relevant requested information.³ I agree with each of the reasons articulated by Member Johnson that favor adhering to *Anheuser-Busch*, with the following additional observations.

First, similar to what I expressed in *Banner Estrella*, I believe the Act requires the Board to balance the importance of taking reasonable measures to foster confidentiality regarding workforce investigations, including the confidentiality of witness statements, against the impact of nondisclosure on NLRA-protected rights.⁴ The majority relegates this balancing to employers with instructions to conduct a de novo case-by-case appraisal of the need for confidentiality, based on a standard that will nearly always require disclosure. By requiring employ-

ers to perform this balancing on a case-by-case basis, I believe my colleagues improperly disregard the Board's "responsibility" to apply the Act "to the complexities of industrial life."⁵

Second, I agree with Member Johnson that the exemption of witness statements from mandatory disclosure, as articulated in *Anheuser-Busch*, serves important purposes. When employees step forward to provide information that may involve a coworker's misconduct, there is little question that they risk coercion, intimidation, harassment, and retaliation, and this risk is especially high if the employer is required to disclose their witness statements to a union.⁶ The rule of *Anheuser-Busch* protects witnesses from this very real concern. That by itself is reason enough to adhere to the rule of *Anheuser-Busch*, but it begets a further reason to do so: because the *Anheuser-Busch* rule enables employers to promise employees that their witness statements will remain confidential, it encourages employees to step forward in the first place and participate in investigations of workplace

⁵ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236).

⁶ The majority rejects my belief that employees risk retaliation when they report misconduct, a risk that overruling *Anheuser-Busch* will exacerbate. I agree with Member Johnson that the Supreme Court's decision in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), in which the Court recognized the danger inherent in the disclosure of witness statements, supports that belief. So, too, does a recent empirical study. According to the 2013 National Business Ethics Survey conducted by the Ethics Resource Center (ERC), 21 percent of employees who reported workplace misconduct suffered retaliation from their superiors or coworkers—a figure the ERC calls "alarmingly high"—and only 63 percent reported misconduct they had observed, in part because of fear of retaliation. Ethics Resource Center, *2013 National Business Ethics Survey of the U.S. Workforce* 9, 26–28 (2014), available at <http://www.ethics.org/downloads/2013NBESFinalWeb.pdf>.

My support for the *Anheuser-Busch* exemption does not stem from a belief that union representatives routinely support or condone retaliation against employee witnesses. As noted in the text, a significant factor favoring nondisclosure of witness statements is the reality that, without an employer's ability to promise confidentiality, employee witnesses reasonably fear coworker retribution and may refuse to provide relevant information. Indeed, the Board majority in *Fresh & Easy* broadly endorsed a "solidarity principle" that renders conduct protected when one employee insists on another employee's help, even when a reluctant coworker strenuously objects to providing it. As the majority stated in *Fresh & Easy*: "An injury to one is an injury to all" is one of the oldest maxims in the American labor lexicon." *Fresh & Easy*, 361 NLRB No. 12, slip op. at 6 (footnote and citations omitted). The principle of "solidarity" is well known in a represented workforce, and it is especially challenged when employees have knowledge relevant to an investigation that may uncover misconduct by a coworker. Indeed, the Board has protected the right of a union not to disclose witness statements based on "the potential for confrontations in the workplace." *Mail Handlers Local 307 (Postal Service)*, 339 NLRB 93, 95 (2003). As the Board properly recognized in *Anheuser-Busch*, the same consideration warrants affording similar protection to witness statements in the possession of an employer.

¹ 361 NLRB No. 12 (2014). In *Fresh & Easy*, a divided Board (with Member Johnson and myself dissenting) found that a single employee's individual complaint involving a statute unrelated to the National Labor Relations Act (NLRA or Act) subjected a workplace investigation to the full panoply of NLRA restrictions and requirements applicable to NLRA-protected concerted activity.

² 362 NLRB No. 137 (2015). In *Banner Estrella*, a divided Board decided that an employer violated the NLRA based on a narrowly tailored "request" that an employee refrain from repeating what was discussed during an investigative meeting. I dissented from the Board majority's decision. 362 NLRB No. 137, slip op. at 5.

³ The majority holds that its new rule will apply prospectively only. Accordingly, they find under *Anheuser-Busch* that the Respondent lawfully refused to produce witness statements from Charge Nurse Barbara Berg and employee Ruth Burns. Because I would adhere to *Anheuser-Busch*, I concur in this result. For the reasons stated below, I would also find that the statement of Charge Nurse Lynda Hutton qualifies as a witness statement notwithstanding that she was not given an express assurance of confidentiality, and the Respondent lawfully refused to produce her statement as well.

⁴ See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (holding that it is the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228–229 (1963) (referring to the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct").

misconduct.⁷ This is extremely important because employees are most often the *only* source of relevant information. And the information is important not only to employers, but also to employees themselves. As I pointed out in *Fresh & Easy Neighborhood Market*, numerous “non-NLRA statutes confer extremely important protection on employees,” and “[a]n employer is the only party on the scene, in real time, who can give employees what is required by . . . numerous employment statutes”—namely, “a legally compliant workplace.”⁸ By overruling *Anheuser-Busch* and subjecting witness-statement confidentiality to a case-by-case determination, the majority makes it impossible for employers to promise employee witnesses that their statements will remain confidential. The predictable result will be far fewer employees who are willing to provide witness statements, with a corresponding loss of investigative effectiveness and consequent weakening of employers’ ability to provide a safe workplace—something the vast majority of employers strive to do regardless of their legal obligation to do so—and a legally compliant workplace under federal statutes other than the NLRA. Here, as in *Fresh & Easy*, the majority’s decision fails to heed the Supreme Court’s longstanding admonition to the Board to accommodate the NLRA to other statutory schemes:

[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for the careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942).

Third, the change wrought by the majority today is not a simple matter of substituting a balancing test for a bright line rule, where witness statements can remain

confidential based merely on a different standard. In the vast majority of cases, a balancing of competing interests *will never happen at all*. Before interests may be balanced, the employer must first establish a legitimate and substantial confidentiality interest in the witness statement requested by the union. And to do so, according to the majority, the employer must show that “witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, [or] there is a need to prevent a cover up.”⁹ Predictably, the majority’s new “confidentiality interest” standard will *never* be satisfied except in extremely narrow, infrequent circumstances. The employer cannot withhold witness statements based on reasonable concerns about potential risks that disclosure may create. It must show that one or more of the specific dangers recited in *Hyundai America* presently exists. In other words, forget about *Detroit Edison* balancing: in the vast majority of cases, employers will simply fail to establish a confidentiality interest to the Board’s satisfaction in the first place.

Fourth, coming as it does on the heels of *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014),

⁹ As authority for this standard, the majority cites *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011), a case that dealt not with witness statements, but with an employer prohibition on disclosure of matters under investigation. The standard itself has an unsound basis in Board precedent. It was stated for the first time in the administrative law judge’s decision in *Hyundai America*. As authority, the judge relied on *Caesar’s Palace*, 336 NLRB 271 (2001), but *Caesar’s Palace* states no such standard. Rather, *Caesar’s Palace* states a totality-of-the-circumstances standard: “To strike a proper balance between the employees’ rights and the [r]espondent’s business justification, we must examine the facts of this case in light of the surrounding circumstances.” *Id.* at 272 (emphasis added). The Board then found that the employer lawfully imposed a confidentiality rule where the ongoing investigation dealt with suspected illegal drug activity in the workplace. In so finding, the Board observed that “[b]ecause the investigation involved allegations of a management coverup and possible management retaliation, as well as threats of violence, the Respondent’s investigating officials sought to impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated.” *Id.* at 272 (emphasis added). In other words, the reasons that warranted a finding that the rule was lawful were specific to the facts of that case, reflecting a proper application of the announced standard of “examin[ing] the facts of this case in light of the surrounding circumstances.” Nonetheless, in *Hyundai America* the judge elevated those case-specific reasons into a standard that must be met in *every* case where an employer seeks to justify a rule prohibiting discussion of an ongoing investigation. (It would make as much sense to say that where, to qualify for a high-jump competition, competitors must clear 5 feet, and an individual proceeds to clear a 5-foot bar with a 7-foot jump, all high jumpers must thenceforward clear 7 feet merely to qualify.) And in the instant case, the majority compounds the error by extending the erroneous *Hyundai America* standard to an entirely different issue: not whether an employer may police disclosures concerning an *ongoing* investigation, but whether an employer has demonstrated a confidentiality interest in witness statements gathered during a *now-completed* investigation.

⁷ The Board’s General Counsel certainly understands the importance of protecting the confidentiality of witness statements obtained in Board proceedings. Parties are not entitled to see witness statements and affidavits gathered by the General Counsel until after the witness testifies, often after an investigation spanning months or even years. See Sec. 102.118(b)(1) of the Board’s Rules and Regulations; *Success Village Apartments, Inc.*, 347 NLRB 1065, 1065 (2006). Neither are parties entitled to discover the identity of the General Counsel’s witnesses before (and unless) they testify. See Sec. 102.117 & 102.118 of the Board’s Rules and Regulations; *Sunshine Piping, Inc.*, 351 NLRB 1372, 1402 (2007). The same concerns underlying the Board’s rules in this regard are present in an employer’s investigation of workplace misconduct and argue in favor of retaining the rule of *Anheuser-Busch*.

⁸ 361 NLRB No. 12, slip op. at 20, 22 (Member Miscimarra, concurring in part and dissenting in part).

this case erects yet another substantial obstacle to a well-functioning system of labor arbitration, contrary to federal policy as reflected in Section 203(d) of the Labor Management Relations Act and the Supreme Court's *Steelworkers* trilogy.¹⁰ In *Babcock*, the Board adopted a new standard for deciding whether to defer discipline and discharge cases to arbitration that will predictably increase the incidence of two track litigation before an arbitrator and the Board. 361 NLRB No. 132, slip op. at 15–16 (Member Miscimarra, concurring in part and dissenting in part). Here, the majority creates another opportunity for two track litigation by making every withheld witness statement a potential occasion for Board litigation. Meanwhile, as recognized by Member Johnson (who quotes former Member Hayes), “the private grievance arbitration machinery will often grind to a halt awaiting a final Board decision.” *Piedmont Gardens*, 359 NLRB No. 46, slip op. at 8 (2012) (Member Hayes, dissenting).

Fifth, I disagree with the proposition that a documented account of particular events, signed by an employee, fails to qualify as a “witness statement” unless the employee was given an express assurance of confidentiality. An affirmative assurance requirement ignores witnesses’ reasonable expectations of confidentiality. The facts presented here illustrate the problem. Charge Nurse Lynda Hutton witnessed employee Arturo Bariuad sleeping on duty. After learning that another charge nurse had reported Bariuad’s misconduct, Hutton decided to submit a statement of her own. As the judge found, “Hutton believed that her witness statement would remain confidential under [the] Respondent’s blanket policy that all witness statements would remain confidential and would not be produced in response to a relevant information request.” With that understanding, she slipped a signed witness statement under Human Resources Director Ali-

son Tobin’s door and later submitted a clarifying statement directly to Tobin.¹¹ Hutton reasonably expected her statements to remain confidential, and I see no principled reason why the rule of *Anheuser-Busch* should not apply only because no one affirmatively informed her that *those particular statements* would be confidential. Accordingly, I would affirm the judge’s finding that the Respondent did not violate Section 8(a)(5) and (1) by refusing to produce Hutton’s witness statements.¹²

Finally, I would find that the Respondent did not violate Section 8(a)(5) when it declined to furnish information in response to the Union’s request for “names and job title [sic] of everyone that was involved in the investigation” of whether employee Bariuad slept on the job. My disagreement with my colleagues on this issue is a narrow one. I agree with the Board’s decision in *Transport of New Jersey*, 233 NLRB 694 (1977), which held that the employer must provide, upon request, the names and addresses of *witnesses* to an incident at issue in a grievance or potential grievance. The names of those who actually witnessed relevant events plainly is relevant information that a union generally is entitled to receive upon request, to the extent known by the employer.¹³ Here, however, the Union did not request the names of everyone who witnessed Bariuad sleeping on

¹¹ Unlike the majority, I find it immaterial that reporting employee misconduct was among Hutton’s job duties. The Respondent assigned her that duty in the context of a workplace where a blanket confidentiality policy protected such reports. I will not assume that her job duty was severable from her expectation of confidentiality. Moreover, confidentiality may be critical to ensure compliance with the job duty.

¹² I do not find persuasive the precedents relied upon by the majority for the proposition that a witness statement is *not* a “witness statement” absent an express assurance of confidentiality. In *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990), enf. 936 F.2d 144 (3d Cir. 1991), the Board found that reports made by respondent’s officials were not witness statements of the complaining customer, where the reports contained only the respondent’s “impressions of what transpired in the conversations with the complaining customer,” and where the customer “did not review the reports, have them read to her at any time, or in any manner adopt them as a reflection of any statement or complaint she may have made.” 300 NLRB at 43. In further support of its finding, the Board added that the customer did not request or receive an assurance of confidentiality, and the employee accused of misconduct already knew the substance of the complaint and had already contacted the customer to intimidate and harass her. *Id.* The Board by no means announced that an express assurance of confidentiality is an element that must be present for *Anheuser-Busch* to apply. Nonetheless, in *El Paso Electric Co.*, 355 NLRB 428 (2010), enf. 681 F.3d 651 (5th Cir. 2012), the administrative law judge misread *New Jersey Bell Telephone* as establishing just that, and the Board adopted the judge’s decision without discussion or analysis. I decline to apply precedent so clearly lacking any reasoned basis.

¹³ On a case-by-case basis, I would carve exceptions to disclosing the names of witnesses where an overriding confidentiality interest is implicated, such as when a witness observed surreptitious illegal activity.

¹⁰ Sec. 203(d) provides that “[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.” See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (stating that the “policy” set forth in Section 203(d) “can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play”); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (“[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.”); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (noting “[t]he federal policy of settling labor disputes by arbitration”); see also *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 254 (1977) (noting “well-established federal labor policy favoring arbitration”).

the job. Rather, it requested the “names and job title [sic] of everyone that was involved in the investigation.” In other words, the Union requested information *about the Respondent’s investigation*. In my view, employers and unions alike are entitled to confidentiality concerning their respective investigations. Moreover, responding to requests like this one would reveal everyone who is cooperating with the employer’s investigation and, like disclosing witness statements, give rise to the risk of retaliation, intimidation, and coercion. Accordingly, I would reverse the judge’s finding that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the requested information.

For the foregoing reasons and those expressed by Member Johnson in his separate opinion, I respectfully dissent.

Dated, Washington, D.C. June 26, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

I would not reverse the longstanding and well-accepted rule of *Anheuser-Busch*, 237 NLRB 982, 984-985 (1978), which holds that witness statements are a categorical exception to an employer’s general obligation to provide relevant information in response to a union’s request, as set forth in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).¹ The bright line rule of *Anheuser-Busch*, which has been the law of the land since 1978, promotes long-recognized important labor policies. For over 30 years, the rule has supported employers’ efforts

¹ I agree with the judge and my colleagues that the Respondent unlawfully failed to provide the Union with the names and job titles of three individuals who claimed that they witnessed an employee engaging in work misconduct that resulted in the employee’s subsequent termination. Similarly, I agree with the majority that, under *Anheuser-Busch*, as applied in *El Paso Electric Co.*, 355 NLRB No. 71 (2010), enfd. 681 F.3d 651 (5th Cir. 2012), and *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), enfd. 936 F.2d 144 (3d Cir. 1991), Charge Nurse Lynda Hutton’s statements were not witness statements exempt from disclosure because they were not provided under an assurance of confidentiality. While I express no view as to whether assurances of confidentiality should be required under *Anheuser-Busch*, I agree for institutional reasons to apply *El Paso Electric* and *New Jersey Bell Telephone* here. See also *HTH Corp.*, 361 NLRB No. 65, slip op. at 48 (2014). Finally, while I dissent from the overruling of *Anheuser-Busch*, I join the majority in holding that the new majority test applies prospectively only, so that the allegations in this case relating to the Respondent’s refusal to produce witness statements from employees Barbara Berg and Ruth Burns must be dismissed.

to assure employee participation in workplace investigations, protected participating witnesses from intimidation, retaliation or harassment by a union or coworkers, enabled employers to effectively conduct investigations of workplace misconduct, and promoted the expeditious resolution of misconduct issues in grievance-arbitration systems. Because strong confidentiality concerns are inherent to all internal employer investigations into employee misconduct, it is my view that an employer should never be required to disclose witness statements to the union. Compelling the production of witness statements will undermine an employer’s ability to investigate claims of workplace violence, harassment, theft, drug and alcohol use, and other forms of serious misconduct in the workplace.

1. The *Anheuser-Busch* rule has protected the integrity of the arbitration process.

The Board has a well-established policy prohibiting the prehearing disclosure of witness statements. The confidential witness affidavit is essential to an unfair labor practice investigation. NLRB Case Handling Manual (Part 1), Unfair Labor Practice Proceedings, Section 10060. In *Hilton Credit Corp.*, 137 NLRB 56, 56 fn. 1 (1962), the Board explained that its nondisclosure policy seeks to prevent the “inhibitory effect” that an employer’s prehearing request for Board affidavits would have on employees’ willingness to furnish statements or otherwise cooperate with Board agents. In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court endorsed the Board’s nondisclosure policy, recognizing the danger inherent in the prehearing disclosure of witness statements. There, the Court held that, prior to the hearing on an unfair labor practice charge, the Board was not required under the Freedom of Information Act to disclose to employers or unions the investigatory statements of witnesses whom the Board intended to call at the hearing. The Court explained that disclosing the witness statements carried several risks to the Board’s investigation, including the “most obvious risk” of coercion and intimidation of employees who provide statements, as well as the reluctance of witnesses to participate in Board investigations and to give candid statements. *Id.* at 239. The Supreme Court recognized that witnesses are particularly likely to fear reprisal and harassment due to the unique character of labor litigation.² *Id.* at 240.

² Because the Supreme Court in 1978 recognized that witness fear of reprisal and harassment are facts of labor litigation, I cannot agree with my colleagues’ notion that an employer must set forth specific evidence—and, indeed, the dissenting opinions here need set forth empirical evidence—to show that employees actually fear reprisal and harassment.

In *Anheuser-Busch*, the Board, relying on *Robbins Tire*, found that requiring the prearbitration disclosure of witness statements “would diminish rather than foster the integrity of the grievance and arbitration process.” *Anheuser-Busch*, 237 NLRB at 984. The Board reasoned that witness statements are “fundamentally different from the types of information contemplated in *Acme*” and requests for their disclosure raise “critical considerations which do not apply to requests for other types of information.” *Id.* In this regard, the Board emphasized that witnesses whose statements are disclosed prior to arbitration hearings could be subject to coercion and intimidation. *Id.* Further, the Board observed that witnesses may be hesitant to provide a statement in the first place absent an assurance that the statement will not be disclosed prior to the hearing. *Id.* (citing *Robbins Tire*, 437 U.S. at 240).

Contrary to my colleagues, I agree with the Board in *Anheuser-Busch* and its progeny that the same considerations underlying the Court’s decision in *Robbins Tire*, apply in the arbitration context. If witness statements are required to be disclosed prior to the arbitration hearing, the witness may face harassment and intimidation designed to change the witness’s testimony or to persuade the witness to refuse to testify at the hearing. Moreover, like unfair labor practice litigation, the arbitration process typically does not permit pretrial discovery. See, e.g., *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362, 1362 (1998) (no violation of Section 8(b)(3) where union failed to provide names of witnesses and evidence for arbitration because “it is well settled that there is no general right to pretrial discovery in arbitration proceedings”). And arbitration proceedings can be just as contentious as unfair labor practice litigation.³

2. The *Anheuser-Busch* rule has enabled effective workplace investigations and legal compliance by employers.

Universally, employers are confronted with the phenomenon of workplace misconduct. It is an unfortunate fact of the modern workplace in our nation. Most employers are naturally inclined to stop misconduct for the sheer sake of stopping misconduct. But regardless, the employment relationship in the United States in 2015 is one of the most regulated relationships that exist. A large part of that body of regulation is creating categories of misconduct, e.g., prohibited kinds of worker-on-

worker harassment, that an employer now has *no choice* but to try to stop. In other words, American employment law forces the investigation of many workplace issues, and employers can no more ignore that law’s commands than they could the force of gravity.⁴

Here, many employers rely on witness statements as their main investigation tool for investigating employee misconduct and ensuring legal compliance. The full and candid participation of employees in investigations of workplace misconduct is essential to employers because such investigations are necessary to maintain workplace safety, to identify and address workplace violence, bullying, sexual and other types of harassment. However, employees are frequently reluctant to cooperate with workplace investigations which could lead to discipline against other employees, and the hard feelings or even perception of outright betrayal that will result from their coworkers, depending on the situation. Here, some employee-witnesses are reluctant, personality-wise, to essentially blow the whistle on others. And, others may justifiably believe that, if their identity is revealed to other employees and/or to their particular union, they may face unwanted confrontations, retaliation, harassment or other coercive acts. The potential for the coercion and intimidation of witnesses exists throughout an employer’s investigation of employee misconduct regardless of whether the matter goes to arbitration.⁵ As such, it is supremely important to all employers to have the ability to assure employees that their participation in workplace investigations will remain confidential, or at least that the law will not put a thumb on the scale to require premature disclosure.

The majority apparently does not believe today’s decision will “unjustifiedly impede” an employer’s legal duty to investigate, finding “no other federal statutory requirement that runs contrary to [their] holding today.” I would suggest that the Equal Opportunity Commission (“EEOC”) might have a better view of how crucial confidentiality is to a statutorily mandated investigation and thus how the majority’s approach directly conflicts with

⁴ I particularly agree with Member Miscimarra’s arguments on this point in relation to *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).

⁵ My colleagues argue that I do not give adequate weight to collective bargaining rights in my analysis, but their argument is essentially misguided. First, my approach would *not* preclude employers and their employees’ bargaining representatives from mutual agreement concerning their own view of proper witness disclosures/protections by utilizing voluntary collective bargaining. Second, at the end of the day, one cannot logically “balance” statutory commands (to investigate) against what the majority calls “the statutory interest of employees in exercising and preserving their contractual rights” in favor of the latter. Parties obviously cannot trump public law mandates with private contractual rights.

³ See *NLRB v. Electronic Workers Local 745*, 759 F.2d 533, 534–535 (6th Cir. 1985) (enforcing order finding that union stewards unlawfully threatened union member with fines for testifying against another employee in arbitration); *Steelworkers Local 5550*, 223 NLRB 854, 855 (1976) (finding that local union president made a veiled threat to convince employee not to testify for the employer in arbitration).

Title VII's mandate, for instance. In EEOC Order 560.005, August 9, 2006, entitled "Prevention And Elimination Of Harassing Conduct In The Workplace," the EEOC highlights its emphasis on confidentiality *within its own investigatory procedures* when confronted an internal complaint:

Maintaining Confidentiality. All reports of hostile or abusive conduct and related information will be maintained on a confidential basis to the greatest extent possible. The identity of the employee alleging violations of this Order will be kept confidential, except as necessary to conduct an appropriate investigation into the alleged violations or when otherwise required by law.

Id., Para.8(f)(1),

http://www.eeoc.gov/eeoc/internal/harassment_order.cfm

(last visited June 20, 2015) (emphasis added). The EEOC

uses similar care with identities of complainants from the private employers it regulates, up until a formal charge is filed. See "Filing A Charge, Confidentiality" at EEOC website ("Information obtained from individuals who contact EEOC is confidential and will not be revealed to the employer until the individual files a charge of discrimination."), see

<http://www.eeoc.gov/employees/confidentiality.cfm> (last

visited June 20, 2015)⁶ The EEOC's guidance is very persuasive to me. Where the main federal agency charged with overseeing statutorily-mandated antidiscrimination investigations tells America—and itself—that confidentiality in investigations is essential, the Board should not institute a rule that operates in reverse.⁷

⁶ Moreover, the importance and necessity of confidentiality to workplace investigations is reflected in many whistleblower statutes that contain confidentiality provisions for whistleblowers. For example, the Internal Revenue Service states that "[t]he Service will protect the identity of the whistleblower to the fullest extent permitted by the law." See Confidentiality and Disclosure for Whistleblowers (<http://www.irs.gov/uac/Confidentiality-and-Disclosure-for-Whistleblowers>).

⁷ My colleagues' observation that the EEOC policy applies only to its own investigations is both technically correct and completely off-point. The stated purpose of the confidential investigation policy is to ensure the establishment of "a model workplace for employees" free from sexual harassment. Id., pars. 2 and 6(a). This obviously represents EEOC's view of what a private employer's practice should be when investigating claims of misconduct under the statute that agency enforces. Equally misguided is the majority's view of how that the policy's confidentiality concerns must be balanced against the requirements of other laws. Here, the EEOC's position in *applying its own statute to itself* is that "[a]ll reports of hostile or abusive conduct and related information will be maintained on a confidential basis to the greatest extent possible" (emphasis in quote added). Logically, then, we are thwarting Title VII's purpose if the Board cuts back on its definition of what has for decades been considered "possible." This is a far cry from the accommodation required under *Southern Steamship*.

The Board had previously recognized this truth of the regulated workplace as well. In *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006), the Board recognized an employer's inherent need to maintain the confidentiality of its internal investigations to effectively conduct investigations of workplace misconduct. There, the Board found that the employer did not unlawfully refuse, on the basis of confidentiality, to furnish the union with a copy of notes from interviews conducted by the employer in investigating an employee's complaint about the threatening conduct of his supervisor. Id. at 214. The Board observed that "an individual's participation in such an investigation, whether as complainant or as witness, may subject the individual to intimidation and harassment by coworkers and/or supervisors" and that "treating [the] interview notes . . . as confidential . . . protect[s] . . . witnesses from retaliation because of their participation." Id. at 212. The Board further reasoned that finding the interview notes confidential served the important objective of "encouraging witnesses to participate in investigations of workplace misconduct." Id. The Board stated:

. . . an employer's inability to reliably assure interviewees of confidentiality is likely to impede its investigations into workplace harassment or threats of violence and to deter the reporting of such incidents. Such investigations are common and often necessary for safety in the current workplace. Without them, an employer would be handicapped in protecting its employees from harm by verifying and correcting workplace misconduct. Similarly, it would be hindered in defending itself against allegations of employer misconduct or vicarious liability for an employee's misconduct. Id. at 212, internal citations omitted.⁸

This common sense observation should go without saying.⁹ In any case, it should not be fundamentally thwarted, as it is by today's astounding decision.

Indeed, in this case, the Respondent, like most employers, has a practice of keeping employee witness statements confidential. Consistent with its confidentiality policy, when the Respondent's human resources

⁸ The Board, in *Northern Indiana*, further noted that both of the employees whose interview notes were withheld "testified that they would have provided less information if they had not been assured" that their interviews would be confidential. Id. at 212.

⁹ In fact, unions may raise the very same common sense concerns to justify a refusal to provide witness statements requested by a represented bargaining unit employee. See *Local 307, National Postal Mail Handlers Union*, 339 NLRB 93 (2003)(union stated that its general policy of refusing to provide witness statements in grievance investigatory file to anyone other than a union agent enhanced its "ability to obtain statements from witnesses who are reluctant to share information.").

director requested that two employees provide written statements to assist in its investigation of an employee's alleged misconduct, she informed these employees that their respective statements would remain confidential. Further, another employee who provided a witness statement without being asked, testified that she thought her statement would be kept confidential. Thus, the rule of *Anheuser-Busch* has made it possible for employers, like the Respondent, to give assurances of confidentiality to employee witnesses regarding their written statements.¹⁰ And it has enabled employees to provide written statements with the security that the information they gave would not be shared with the union or their coworkers. The ability to protect witness statements from disclosure under the *Anheuser-Busch* exemption has encouraged employees to participate in investigations of workplace misconduct and protected these employees from coercion, intimidation and retaliation because of their participation. Further, the rule has allowed employers to effectively address workplace harassment, threats, violence, and other serious issues.

My colleagues say that furnishing a union with a list of names of employees who were involved in or witnessed an incident carries the same risk as providing their statements or information concerning their statements. I disagree. Generally, concerns of harassment and intimidation are much greater where the contents of a witness statement are disclosed than if the union is given only the names of the witnesses. A union is unaware of what the witness told the employer with a list of witness names. Further, the witness can determine what they want to tell the union if subsequently asked. In contrast, disclosing the witness statement will alert the union as to whether a witness informed the employer of the grievant's misconduct. The union, and anyone the union informs, will know whether a witness is "for" or "against" the grievant. Indeed, the Board in *Anheuser-Busch* recognized this difference by distinguishing its holding from *Transport of New Jersey*, where the Board held that an employer does have a duty to turn over to the union the names of witnesses to an incident for which the employee was disciplined. 237 NLRB at 985 fn. 5, citing *Transport of New Jersey*, 233 NLRB 694, 694-695 (1977).¹¹

¹⁰ The majority points out that these assurances are not ironclad even under *Anheuser-Busch*, but that does not diminish the point that, under the new rule, there can now *never* be an assurance of confidentiality.

¹¹ *Boyetown Packaging Corp.*, 303 NLRB 441, 444-445 (1991), is instructive. In that case, an employee was terminated due to the inattentive driving of a forklift. The employer furnished the union with the names of all employees it interviewed, but refused to identify which of these witnesses complained about the grievant or to provide any state-

3. The *Anheuser-Busch* rule has not interfered with a union's ability to investigate grievances.

My colleagues assert that *Anheuser-Busch* is inconsistent with the Board's longstanding policy to favor the disclosure of information in the interest of promoting collective bargaining. Yet, my colleagues do not argue that the *Anheuser-Busch* rule has impeded a union's ability to investigate or evaluate grievances. That is because there is no evidence that, in the 37 years of the *Anheuser-Busch* precedent, unions have had to arbitrate unmeritorious grievances as a result of receiving insufficient information from employers. Under the *Anheuser-Busch* rule, unions have been able to obtain more than sufficient information to conduct their own investigations of alleged employee misconduct and fulfill their duty of fair representation. In particular, a union can request information to obtain the names of all witnesses involved in and/or interviewed in an employer's investigation. *Transport of New Jersey*, 233 NLRB at 694-695. This information permits the union to obtain on its own the substantive information that it needs.¹² Moreover, individual employees can always assist the union in its investigation. In many cases, the Board has required the employer to provide the union with a summary of the substance of the witness statements, without producing the actual witness statements or revealing the witnesses' identity. See, e.g., *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1107 (1991). The union can use the summary in determining whether to arbitrate the matter. In addition, the parties can always negotiate language in

ments. *Id.* at 444. The Board affirmed the findings of the judge, who explained:

Revealing the names of only those who gave evidence damaging to [the grievant] is little different from delivering the statements of identified witnesses because the employer would, by naming those who complained, in fact make a statement on their behalf in their names. Moreover, the singling out of witnesses adverse to a grievance spotlights them as opponents to the grievant's cause and, by so doing, unnecessarily enhances the possibility they may be subject to coercion or intimidation in an effort to persuade them to change or retract their oral reports previously given to the employer. It is precisely this possibility of coercion and intimidation of witnesses that the Board's decision in *Anheuser-Busch* was designed to prevent, and I perceive no logical reason why the same policy of preventing coercion and intimidation of witnesses should not apply to requests limited to the names of employee witnesses who complained.

Id. at 444-445.

See also *Northern Indiana*, 347 NLRB at 214 (although the employer had disclosed the names of the individuals involved in the incident and interviewed by the supervisor, these employees would be reasonably concerned about retaliation if the union was provided with the notes from their interviews).

¹² See *Northern Indiana Public Service*, 347 NLRB at 214 (furnishing the union with the names of the interviewees and those involved in the incident was a sufficient accommodation; the union could interview these people).

their collective-bargaining agreements providing for procedures for disclosure.

4. The *Detroit Edison* test will have inconsistent and unpredictable results.

My colleagues have replaced the bright line and well-reasoned rule in *Anheuser-Bush* with the imprecision of the case-by-case balancing of interests test articulated in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), to determine whether witness statements obtained during investigations of employee misconduct should be protected on the basis of confidentiality. The Board has taken a simple standard and replaced it with a fact-intensive, case-by-case analysis that will have inconsistent and unpredictable results. Under the *Detroit Edison* test, employers can still choose to withhold witness statements on the basis of confidentiality. However, the burden will now be on them to substantiate a confidentiality claim. The Board will have to engage in lengthy, fact specific assessments every time it has to decide whether an employer established a substantial confidentiality interest to justify its failure to furnish a witness statement. In light of the Board's previous decisions, in most cases, employers will not satisfy that burden.¹³

Under the *Detroit Edison* balancing test, employers will have no certainty whether they can show that a legitimate and substantial confidentiality interest exists and outweighs the union's need for the information. Further, going forward, unions, will almost always request witness statements when a unit employee is disciplined. This will create unnecessary litigation before the Board and will substantially delay the resolution of grievances in arbitration. As then-Member Hayes stated in his dissent in the vacated decision, the *Detroit Edison* balancing test is likely to turn what is a relatively efficient grievance-arbitration process into protracted litigation before the Board during which "the private grievance arbitration machinery will often grind to a halt awaiting a final Board decision." *Piedmont Gardens*, 359 NLRB No. 46,

¹³ See e.g., *Howard University*, 290 NLRB 1006, 1007 (1988) (employer failed to carry its burden of proof with respect to the confidentiality of the physicians' and nurses' progress notes and the autopsy protocol report requested by the union in connection with employee's discharge); *LaGuardia Hospital*, 260 NLRB 1455 (1982) (union's need for relevant information contained in patient charts for use in evaluating grievances that had been filed regarding employee discipline, outweighed the employer's legitimate concerns regarding patient privacy); *Postal Service*, 332 NLRB 635, 637 (2000); *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990), enf'd, 936 F.2d 144 (3d Cir. 1991). Balancing tests are inherently susceptible to results-oriented outcomes, even when courts call the Board into account for odd results. See *Fortuna Enterprises, L.P. d/b/a The Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128 (2014) at 10 fn.3 (Johnson, concurring) (noting results oriented problems of balancing tests).

slip op. at 8 (2012). The Board will now decide this issue using a highly subjective analysis, which substitutes doubt for certainty. This is contrary to the national labor policy favoring the prompt resolution of disputes through the informal process of arbitration. See *Fairweather's Practice & Procedure in Labor Arbitration*, 135–136 (Ray J. Schoonhoven ed., 3d ed. 1991) ("[W]hile the use of a Section 8(a)(5) or an 8(b)(3) unfair labor practice proceeding is available in a situation where a party refuses to disclose relevant information, such remedy may be impractical given the time consuming nature of such a proceeding, because, if the information is critical, the arbitration must be put 'on hold' until the resolution of the unfair labor practice charge. Thus, the function of arbitration, that is, the quick resolution of [e]mployment disputes, is destroyed." (footnotes omitted)).

My colleagues cite Board decisions as support for their position that the *Detroit Edison* balancing test is a superior approach to the *Anheuser-Bush* rule.¹⁴ The majority observes that the Board found that the employers in *Pennsylvania Power* and *Mobil Oil* had a stronger confidentiality interest justifying their refusal to produce the names of informants who provided information about suspected employee drug use than the employer in *Metropolitan Edison*, who refused to provide the names of two informants who provided information about workplace theft. The Board in *Metropolitan Edison* relied on the fact that the likelihood of retaliation against the informants was speculative. 330 NLRB at 108. Contrary to my colleagues, these cases actually illustrate the problems, as discussed above, with applying the *Detroit Edison* balancing test. The Board's finding that the employer's confidentiality interest in *Metropolitan Edison* was weaker than in *Pennsylvania Power* and *Mobil Oil*, was completely arbitrary. In his dissent in *Metropolitan Edison*, former Member Brame addressed the flaws with the Board's application of its subjective balancing test. He observed that:

It would take the wisdom of Solomon and the time of the ages for the Board, on a case-by-case basis, to attempt to grade and classify all potential forms of employee misconduct and to determine how the gravity of the offense ranks in the majority's subjective scale of various legitimate interests. Moreover, there is no correlation between the majority's perceptions of the nature of the misconduct and the potential peril to an informer. When the informant gives up information that results in an employee's dismissal, it does not matter if the discharge is because of workplace theft or drug use.

¹⁴ *Pennsylvania Power*, supra, *Mobil Oil*, 303 NLRB 780, 780–781 (1991), and *Metropolitan Edison*, 330 NLRB 107 (1999).

The employee's job is lost just the same and the resentment of fellow employees toward the informer is likely to be just as great.

An employee contemplating whether to provide confidential information should not be required to attempt to predict how the Board will apply its subjective balancing test Such a rule will have a chilling effect on informants and employees.¹⁵

I also find it troubling that my colleagues have failed to provide any "safe harbor" in replacing the *Anheuser-Busch* rule with the *Detroit Edison* standard. For example, it is my view that an employer should not have to disclose a witness statement where serious misconduct is involved.

5. The *Detroit Edison* test will impair employer investigations of workplace misconduct.

Absent a bright line rule exempting witness statements from disclosure, employers will be unable to effectively conduct investigations of workplace misconduct. If employers are unable to assure employee witnesses that their statements will remain confidential, an employer's ability to encourage employees to report such misconduct and to secure the cooperation of witnesses in the investigation process will be severely handicapped. Employees will be deterred from candidly participating in employer investigations into workplace misconduct. This will certainly impact employees' willingness to report incidents of misconduct, particularly those involving workplace harassment, violence, or other serious threats to workplace safety. This chilling effect on witness participation will decrease the overall quality of employer investigations into workplace misconduct. That is why the *Anheuser-Busch* Board created "a clear, simple, and all-encompassing rule rather than one which entails detailed examination and balancing of all the particular facts." *Whirlpool Corp.*, 281 NLRB 17, 22 (1986).¹⁶

The Board's decision today continues a recent trend that, in expanding the Act's protection, the Board has made it more difficult for employers to conduct thorough

workplace investigations and has interfered with an employer's responsibility for enforcing a wide array of federal, state and local statutes and regulations that protect individual employees. In *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014), a Board majority held that an employee's solicitation of her coworkers to act as witnesses in her individual complaint of sexual harassment to the employer was protected concerted activity. Member Miscimarra, in his dissent, astutely observed that the majority's holding would interfere with an employer's ability to investigate sexual harassment complaints and undermine employees' interests with respect to those and other non-NLRA claims. *Id.*, slip op. at 12. See also my dissenting opinion in *Plaza Auto Centers, Inc.*, 360 NLRB No. 117, slip op. at 12 (2014) (by preventing an employer from discharging an employee who made obscene and denigrating remarks to management during the course of otherwise protected activity, the Board will impede effective enforcement of other employment laws). As in the foregoing precedent, I believe that today's decision will further hinder the ability of employers to conduct investigations of workplace misconduct and comply with statutes that require prompt, thorough investigations.

6. The disclosure of witness statements will interfere with an employer's work product.

My colleagues, in creating this new rule, have not defined the parameters of a witness statement. It is my view that the failure to thoroughly define a witness statement will unfortunately capture many types of grievance-preparation materials and thereby interfere with an employer's work product. In this regard, in the course of investigating workplace misconduct, employers often obtain witness statements because of the prospect of anticipated litigation. That is, employers often reasonably anticipate that employee discipline for misconduct will trigger a grievance/arbitration proceeding. See *Central Telephone Co. of Texas*, 343 NLRB 987, 989 (2004) (noting that "[i]n the world of labor relations, the discharge of four union officers . . . for actions taken in their capacity as union officials, would likely (albeit not inevitably) result in the [u]nion's pursuing arbitration or filing an unfair labor practice charge"). Indeed, it would be an unsurprising truism that—in today's highly regulated employment relationship, with its concomitant high incidence of litigation—just about any employment-related investigation is undertaken in preparation of litigation. Thus, in many cases, such witness statements should be protected from disclosure under the attorney work product privilege. Witness statements are work product when they contain a manager's personal thoughts, mental impressions, strategies, and recommen-

¹⁵ 330 NLRB at 114–115.

¹⁶ The majority argues that the *Detroit Edison* test will effectively protect both the employer and witnesses where the employer raises a reasonable concern regarding confidentiality, harassment, or coercion. However, if witnesses do not believe that the information they disclose will be kept confidential, they are likely to simply not get involved or provide less information, regardless of whether any actual threats against them have been made. And actual evidence of harassment and coercion may not arise until after confidential witness information has been revealed, and the union or its members have improperly used it to intimidate the witness.

dations in anticipation of litigation/arbitration. For example, if an employer tells a witness that it would like to focus on certain topics, then the witness statement would reveal the employer's views as to what it considers to be important. Further, in conducting a workplace investigation, managers often prepare a summary of the witness statements or interview notes, which may contain the manager's opinions and thought processes.

The Board has recognized the importance of the work product protection. In *Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004), the Board stated that "the essential question in determining whether a document qualifies as work product is 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" (citing *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 fn. 42 (D.C. Cir. 1987) (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024 (1970)) (emphasis in original)). Further, in *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998), the D.C. Circuit stated that "[p]rotection is needed because an attorney preparing for trial must assemble much material that is outside the attorney client privilege, such as *witness statements*, investigative reports, drafts, pleadings and trial memoranda." (emphasis added). The Board and the courts have found witness statements and related documents prepared in anticipation of litigation protected from disclosure under the work product privilege. In *Postal Service*, 305 NLRB 997, 1000 (1991), the union filed a grievance asserting that nonbargaining unit postal inspectors imposed limitations on the representative role of a union steward during their interrogation of a bargaining unit employee and the inspectors forcibly removed the union steward from the interrogation. The Board agreed with the judge that the employer lawfully refused to provide to the union the nonwitness opinions, comments, and recommendations contained in the investigatory file concerning the interrogation incident. *Id.* at 997. The judge reasoned that such material "would bear only on the [employer's] internal deliberations . . . and [the employer's] interest in maintaining confidentiality of this material seem[ed] clear." *Id.* at 1006.¹⁷

¹⁷ See also *Central Telephone*, 343 NLRB at 989 (notes that the employer prepared during the course of its investigation into alleged misconduct by four union officers/employees were protected from disclosure to the union under the attorney work product doctrine); *Butler Manufacturing Co., Inc. v. Americold Corp.*, 148 F.R.D. 275 (D.Kan. 1993) (a recorded statement that a third-party gave to defendant's investigator was "clearly work product" because it was taken in anticipation of litigation); *SEC v. Cavanagh*, No. 98 Civ 1818(DLC), 1998 WL 132842 (S.D.N.Y. Mar. 23, 1998) (notes of SEC attorneys of

The Board has further recognized the importance of protecting a party's internal strategy and thought process in an analogous situation. In *Berbiglia, Inc.*, 233 NLRB 1476 (1977), the Board affirmed the judge's quashing a subpoena for union documents requested by an employer asking for records, including communications between the union and its members. The judge quashed the subpoena for several reasons but primarily because it could reveal bargaining strategy. The judge commented:

The basic reason for revocation of subpoena as far as here relevant was my view that requiring the Union to open its file to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between the Union and its members. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. *Id.* at 1495.

Thus, another problem created by the abandonment of the bright line *Anheuser-Busch* standard is that employers—in addition to having to meet an impossible burden to substantiate a confidentiality claim—in many cases, will now have to establish that witness statements are protected from disclosure under the work product doctrine. As such, the burden will be on the employer to defend its own work product. This additional hurdle will interfere with an employer's thought process in conducting workplace investigations. The disclosure of work product in the form of the employer's mental impressions will hinder the quality of an employer's workplace investigation. I believe that, in setting forth a new rule, the majority should have clearly defined the term "witness statement," and clarified that it would exclude a manager's personal thoughts, mental impressions, strategies, and recommendations in anticipation of litigation/arbitration. While I credit the majority for their statement that they are not outright abolishing the work product privilege, it seems fairly obvious to me that this new doctrine is on a collision course with it.

Conclusion

In sum, for over 30 years, the rule of *Anheuser-Busch* has protected the arbitration process, protected employee witnesses who participate in workplace investigations from coercion and intimidation and enabled employers to conduct effective investigations into workplace misconduct. Because confidentiality is universally central to all employer internal investigation of employee misconduct,

prelitigation interview of defendants were "classic" opinion work product, not discoverable by defendants).

the *Detroit Edison* case-by-case balancing of confidentiality interests is inappropriate and unnecessary.

Dated, Washington, D.C. June 26, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union by refusing to provide requested information that is relevant and necessary to the processing of a grievance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide the Union with the requested names and job titles of informants against Arturo Bariuad.

WE WILL provide the Union with the requested statements of Lynda Hutton.

AMERICAN BAPTIST HOMES OF THE WEST D/B/A
PIEDMONT GARDENS

The Board's decision can be found at www.nlr.gov/case/32-CA-063475 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

